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*216 W. Va. 634, *; 609 S.E.2d 895, **;*
*2004 W. Va. LEXIS 197, ****

BRAD BOWYER, Plaintiff Below, Appellee v. HI-LAD, INC., d/b/a Comfort Inn of Charleston, a West Virginia corporation, Defendant Below, Appellant and WESTFIELD INSURANCE COMPANY, Intervenor Below, Appellee and SECURITY & SURVEILLANCE, INC., Third-party Defendant Below, Appellee

No. 31697

SUPREME COURT OF APPEALS OF WEST VIRGINIA

216 W. Va. 634; 609 S.E.2d 895; 2004 W. Va. LEXIS 197

September 14, 2004, Submitted
December 3, 2004, Filed

PRIOR HISTORY: **[***1]** Appeal from the Circuit Court of Kanawha County. Hon. Paul Zakaib, Jr., Judge. Civil Action No. 00-C-2023.

DISPOSITION: AFFIRMED, IN PART, REVERSED IN PART, AND REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant corporation challenged a decision from the Circuit Court of Kanawha County (West Virginia), which held it liable to appellee employee for a violation of the West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code §§ 62-1D-1 to -16. The corporation also sought review of the granting of summary judgment to appellee manufacturer and the finding that it was not entitled to coverage or a legal defense from appellee insurer.

OVERVIEW: The employee filed an action against the employer under the Act when he discovered hidden microphones. After the jury returned a verdict in favor of the employee, the employer sought review. On appeal, the court determined that the jury properly denied the employer's post-trial motions. There was sufficient circumstantial evidence for the jury to conclude that the employer intercepted the contents of the employee's oral communications. Further, the employee had a reasonable expectation that his oral communications would not have been recorded. The court upheld the compensatory damages awarded because the evidence showed that the employee suffered embarrassment, humiliation, and distress. The award of punitive damages was authorized under the Act, and it bore a reasonable relationship to the compensatory damages. The jury was given proper instructions on the issue of punitive damages. The employer was entitled to coverage and a legal defense under its insurance policy because the language was ambiguous, and the insurer failed to prove that exclusions applied. The employer was not entitled to indemnity from the manufacturer because the employer committed an independent wrong.

OUTCOME: The court affirmed the judgment in favor of the employee and the decision to grant the manufacturer summary judgment. The portion of the decision declaring that the employer was not entitled to coverage or a defense was reversed. The case was remanded for further proceedings.

CORE TERMS: punitive damages, surveillance, conversation, hotel, microphone, circumstantial evidence, hidden, interception, intercept, indemnification, third-party, manager, monitoring, intercepted, new trial, matter of law, insurance policy, installed, coverage, lawsuit, front, desk, wire, punitive damage award, electronic communication, intentionally, disclose, intentional infliction of emotional distress, hotel employees, electronic

LexisNexis(R) Headnotes ◆ Hide Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Judgments > General Overview

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1 W. Va. R. Civ. P. 50(b) (1998) provides that, in ruling upon a motion for judgment after a verdict is returned, a circuit court may: (a) allow the judgment to stand, (b) order a new trial or (c) direct the entry of judgment as a matter of law. In considering whether a motion for judgment notwithstanding the verdict under Rule 50(b) should be granted, the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a prima facie right to recover, the court should grant the motion. In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN2 See W. Va. R. Civ. P. 50(b) (1998).

Civil Procedure > Trials > Judgment as Matter of Law > Alternative Motions

Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials

Civil Procedure > Appeals > Standards of Review > General Overview

HN3 An appellate court reviews the rulings of a circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and it reviews the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

Insurance Law > Claims & Contracts > Policy Interpretation > Appellate Review

HN4 The determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law. Where the issue on an appeal from the circuit court is clearly a question of law, an appellate court applies a de novo standard of review. Thus, the interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment shall be reviewed de novo on appeal. More Like This Headnote

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > General Overview

HN5 A circuit court's entry of summary judgment is reviewed de novo. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Fraud > Computer Fraud > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > Elements

HN6 See W. Va. Code § 62-1D-3(a) (1987).

Civil Procedure > Remedies > Damages > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

HN7 See W. Va. Code § 62-1D-12 (1987).

Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

HN8 See W. Va. Code § 62-1D-2(e) (1987).

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

HN9 There is no qualitative difference between direct and circumstantial evidence when considering whether there is sufficient evidence to support a jury's verdict. In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

HN10 See W. Va. Code § 62-1D-2(h) (1987).

Governments > Legislation > Interpretation

HN11 When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute. More Like This Headnote

Computer & Internet Law > Copyright Protection > Civil Infringement Actions > Defenses > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > Elements

Governments > Legislation > Interpretation

HN12 The West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code §§ 62-1D-1 to -16, plainly prohibits any person from intentionally acquiring another person's oral communications through the use of some electronic or mechanical device, when that other person has a reasonable expectation that their conversation is not subject to being acquired by an electronic or mechanical device. Most employees, even those working in "public" spaces, have a reasonable expectation that their oral communications with other employees or with customers are not going to be recorded by hidden microphones. More Like This Headnote

Civil Procedure > Remedies > Damages > General Overview

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

HN13 The West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code §§ 62-1D-1 to -16, accords a jury considerable leeway in awarding a person whose communications have been intercepted their actual damages, and goes so far as to require the jury to award a minimum of $ 100 in damages for each day that the Act is violated. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > Elements

Torts > Damages > Punitive Damages > Conduct Supporting Awards

HN14 The specific principles and procedures established in Tudor v. Charleston Area Medical Center are limited to the tort of the intentional or reckless infliction of emotional distress. Furthermore, the West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code §§ 62-1D-1 to -16, specifically states that any person whose oral communications are intercepted may recover punitive damages, if found to be proper. W. Va. Code § 62-1D-12(a)(3). Tudor is not extended so as to preclude the recovery of punitive damages under the Act. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > Damages > Punitive Damages > Award Calculations > Appellate & Posttrial Review

HN15 West Virginia's punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under Mayer; second, if a punitive damage

award is justified, then a review is mandated to determine if the punitive damage award is excessive under Garnes. More Like This Headnote

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Remedies > Damages > General Overview

Torts > Damages > Punitive Damages > Award Calculations > Factors

HN16 When a trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows: (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater. (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > Damages > Punitive Damages > Award Calculations > Appellate & Posttrial Review

Torts > Damages > Punitive Damages > Award Calculations > Factors

HN17 When a trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors include: (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant. (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages. (5) The financial position of the defendant is relevant. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > Damages > Punitive Damages > Award Calculations > Appellate & Posttrial Review

Torts > Damages > Punitive Damages > Award Calculations > Factors

HN18 If a jury awards punitive damages to a litigant, a circuit court must carefully review the jury's verdict applying the five factors contained in Garnes, as well as several other factors. When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors: (1) The costs of the litigation; (2) Any criminal sanctions imposed on the defendant for his conduct; (3) Any other civil actions against the same defendant, based on the same conduct; and (4) The appropriateness of

punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff. Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Defenses > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

HN19 It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured. More Like This Headnote

Business & Corporate Law > Foreign Businesses > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

Insurance Law > Industry Regulation > Insurance Company Operations > Conducting Business > Foreign Insurers

HN20 An insurance company's duty to defend an insured is broader than the duty to indemnify under a liability insurance policy. An insurance company has a duty to defend an action against its insured if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. If, however, the causes of action alleged in the plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. Included in the consideration of whether an insurer has a duty to defend is whether the allegations in the complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy. Thus, any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

HN21 See W. Va. Code § 62-1D-3(b).

Criminal Law & Procedure > Scienter > General Intent

Evidence > Procedural Considerations > Burdens of Proof > General Overview

Insurance Law > General Liability Insurance > Exclusions > Criminal Acts

HN22 It is well settled in West Virginia that an insurance company seeking to avoid

liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. More Like This Headnote

Criminal Law & Procedure > Scienter > General Intent

Evidence > Procedural Considerations > Burdens of Proof > General Overview

Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > General Overview

HN23 Criminal intent must be proven beyond a reasonable doubt, while a jury in a civil case need only apply a preponderance of the evidence test to find intent. More Like This Headnote

Torts > Procedure > Multiple Defendants > Contribution > General Overview

HN24 The requisite elements of an implied indemnity claim in West Virginia are a showing that: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

Governments > Legislation > Interpretation

Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > General Overview

HN25 The plain language of the West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code §§ 62-1D-1 to -16, imposes civil liability upon the person who intercepts, discloses, uses or procures any other person to intercept, disclose or use the communications. W. Va. Code § 62-1D-12. It does not impose liability upon the manufacturer of equipment that is used by the person to violate the Act. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Illegal Eavesdropping > General Overview

Public Health & Welfare Law > Social Security > Disability Insurance & SSI Benefits > General Overview

Torts > Procedure > Multiple Defendants > Contribution > General Overview

HN26 A defendant seeking indemnification must show that its independent actions did not contribute to the injury. In other words, the defendant seeking indemnification must be one who has committed no independent wrong. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

Evidence > Procedural Considerations > Burdens of Proof > General Overview

HN27 The liberality allowed in the amendment of pleadings does not entitle a party to be dilatory in asserting claims or to neglect his case for a long period of time. Lack of

diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his neglect and delay. More Like This Headnote

◆ Hide Headnotes / Syllabus

SYLLABUS: BY THE COURT

1. "In considering whether a motion for judgment notwithstanding the verdict under Rule 50 (b) of the West Virginia Rules of Civil Procedure should be granted, the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a *prima facie* right to recover, the court should grant the motion." Syllabus Point 6, *Huffman v. Appalachian Power Co.*, 187 W.Va. 1, 415 S.E.2d 145 (1991).

2. "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syllabus Point 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983). **[***2]**

3. "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syllabus Point 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002).

4. "The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgement, shall be reviewed *de novo* on appeal." Syllabus Point 2, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999).

5. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

6. "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syllabus Point 3, *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963).

7. "When **[***3]** a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5, *State v. General Daniel Morgan Post No. 548*, V.F.W., 144 W.Va. 137, 107 S.E.2d 353 (1959).

8. "The specific principles and procedures established in Syllabus Points 14 and 15 of *Tudor v. Charleston Area Medical Center*, 203 W.Va. 111, 506 S.E.2d 554 (1997) are limited to the tort of the intentional or reckless infliction of emotional distress." Syllabus Point 11, *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 547 S.E.2d 256 (2001).

9. "Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897

(1991). **[***4]** " Syllabus Point 7, *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

10. "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

"(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

"(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar **[***5]** conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

"(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

"(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

"(5) The financial position of the defendant is relevant."

Syllabus Point 3, *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

11. "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

"(1) The costs of the litigation;

"(2) Any criminal sanctions imposed on the defendant for his conduct;

"(3) Any other civil actions against the same defendant, based on the same conduct; and

"(4) The appropriateness of punitive damages to encourage fair and reasonable settlements **[***6]** when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

"Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

12. "It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syllabus

Point 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

13. "Any, question concerning, an insurer's duty to defend under an insurance policy **[***7]** must be construed liberally in favor of an insured where there is any question about an insurer's obligations." Syllabus Point 5, *Tackett v. American Motorists Ins. Co.*, 213 W.Va. 524, 584 S.E.2d 158 (2003).

14. "The requisite elements of an implied indemnity claim in West Virginia are a showing that: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share." Syllabus Point 4, *Harvest Capital v. West Virginia Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509 (2002).

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JUDGES: The Opinion of the Court was delivered Per Curiam. CHIEF JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion. JUSTICE DAVIS dissents.

OPINION:

[*640] **[**901]** Per Curiam:

In this appeal from the Circuit Court of Kanawha County, the appellant corporation seeks review of a jury verdict holding the appellant liable for intercepting the private conversations of an employee of the appellant through the use of hidden microphones in the workplace. The appellant challenges the circuit court's decision to uphold the jury's verdict. The appellant also challenges a circuit court order granting summary judgment to the company that manufactured and installed the microphones, and thereby dismissing the appellant's third-party complaint for contribution or indemnification. Lastly, the appellant contends that the circuit court erred in declaring that the appellant was not entitled to coverage or **[***9]** a legal defense under an insurance policy purchased by the appellant.

After careful review of the trial transcript, the briefs and arguments of the parties, and the relevant statutory and case law, we conclude that the circuit court correctly upheld the jury's verdict. Further, we find the circuit court properly dismissed the company that manufactured and installed the hidden microphones. We affirm the circuit court's decisions on these two points.

However, we conclude that the appellant is entitled to insurance coverage and a legal defense under its insurance policy, and reverse the circuit court's decision on this point.

I.

The appellant, Hi-Lad, Inc., is an independent owner of a 112 room "Comfort Inn" **[**902]** **[*641]** hotel franchise in Cross Lanes, West Virginia. In 1998, appellee Security & Surveillance, Inc. ("SSI") approached the owner of the appellant, Greg Hicks, and offered to professionally install an electronic surveillance system. Mr. Hicks initially leased, and later purchased, a surveillance system from SSI and executed a written contract in which Hi-Lad, Inc., agreed to indemnify SSI for any loss arising out of Hi-Lad's use of the equipment. The system that Mr. Hicks had installed **[***10]** consisted of cameras and microphones at three public locations within the hotel: the front desk, the lobby, and the hotel bar. n1 Mr. Hicks contends that he was reassured by the SSI salesman that the system was "completely legal" in West Virginia.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 There are also indications in the record that, for at least some period of time, a camera and a microphone were also installed to observe the hotel's public hot tub.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Appellee Brad Bowyer was hired by the appellant in April 2000 to work as a front desk clerk. Mr. Bowyer noticed the surveillance cameras in public areas and was not concerned. However, several days after beginning his employment, a fellow employee stated to Mr. Bowyer that there were microphones hidden in the hotel. Mr. Bowyer immediately asked an assistant manager whether this was true, and was told that there were microphones but that they had been disconnected.

In late May or early June 2000, surveillance monitoring equipment - including a television set, a videotape recorder, and a speaker - appeared **[***11]** in the manager's office directly off of the front desk of the hotel. The monitoring equipment had originally been located and operated in a locked, upstairs manager's office that was accessible by only two people.

At some point in June 2000, Mr. Bowyer noticed the monitoring equipment and again approached the assistant manager to ask her about the existence of microphones. Again, Mr. Bowyer was reassured that the microphones were disconnected.

In and about this period, while he was working at the front desk, Mr. Bowyer heard a sound coming from the computer in the manager's office that sounded like a telephone dial-up when a computer modem connects to the internet. At this point, Mr. Bowyer asked one of the hotel managers about the source of the sound:

> And I asked [the manager] what that was, and she said it was Mr. Hicks dialing into the system so that he could monitor our activities, both oral and visually, so he could keep an eye on his investment.

Around the same time period, Mr. Bowyer entered the manager's office with the monitoring equipment, turned one knob on the equipment and immediately heard audio information coming over the system from microphones in **[***12]** areas of the hotel.

Mr. Bowyer thereafter sought the advice of an attorney, and upon returning to work photographed the surveillance monitoring equipment in the manager's office. Mr. Bowyer also ejected a videotape from the inside of the videotape recorder and took the tape.

On August 17, 2000, Mr. Bowyer filed a single-count complaint against the appellant with the circuit court. The complaint alleged that appellee Bowyer had been subjected to "illegal oral surveillance by electronic surveillance apparatus owned and operated by the [appellant]" in violation of the West Virginia Wiretapping and Electronic Surveillance Act, *W.Va. Code*, 62-1D-1 to -16. The complaint demanded actual and punitive damages, reasonable attorney's fees and costs, and pre- and post judgment interest.

Appellant Hi-Lad, Inc. sought coverage and a legal defense for Mr. Bowyer's lawsuit from its commercial general liability insurance company, appellee Westfield Insurance Company ("Westfield"). Westfield responded by filing a motion to intervene in the case pursuant to Rule 24 of the *West Virginia Rules of Civil Procedure* and filed a complaint against the appellant seeking **[***13]** a declaratory judgment that there was no coverage **[**903]** **[*642]** for Mr. Bowyer's lawsuit under the liability policy purchased by the appellant.

The circuit court entered an order allowing Westfield to intervene on December 1, 2000. The circuit court initially ruled that Westfield was required to defend and indemnify Hi-Lad, Inc. However, after extensive discovery between the parties, on September 5, 2001 the circuit court entered an order declaring that Westfield had no duty to defend or indemnify the appellant, and dismissing Westfield from the case.

Thereafter, on April 3, 2002, appellant Hi-Lad, Inc. filed a third-party complaint against SSI seeking contribution or indemnification for Mr. Bowyer's lawsuit. The third-party complaint alleged that SSI was guilty of negligence in failing to make proper disclosures about the surveillance system, negligence that was the proximate cause of Mr. Bowyer's damages.

Appellee SSI filed a motion for summary judgment, a motion that was granted by the circuit court on October 1, 2002. The circuit court concluded that, as a matter of law, no cause of action exists under the Wiretapping and Electronic Surveillance Act against the manufacturer of electronic **[***14]** equipment that is used by a purchaser in violation of the statute. Thus, because Mr. Bowyer could not maintain a cause of action against SSI for manufacturing or installing the hidden microphones, appellant Hi-Lad, Inc. similarly could not maintain a cause of action against SSI for contribution. Furthermore, the circuit court concluded that appellant Hi-Lad, Inc.'s claim for indemnification should be dismissed because the appellant was charged, by operation of law, with knowledge of its obligations under the Act; the appellant therefore could not claim to be without fault. Lastly, the circuit court prohibited the appellant from amending its third-party complaint to add other causes of action because of the passage of the statute of limitation, and because of the indemnification language in the SSI contract that would, in the end, require Hi-Lad, Inc. to repay SSI for all of its losses and expenses.

The case proceeded to trial, and on February 6, 2003, a jury returned a verdict in favor of the appellee, Mr. Bowyer. The jury found that the appellant had engaged in unlawful electronic surveillance and awarded Mr. Bowyer $100,000.00 in compensatory damages and $400,000.00 in punitive **[***15]** damages. A judgment order was entered by the circuit court on April 11, 2003. The appellant filed post-trial motions for judgment as a matter of law or for a new trial that were denied by the circuit court on May 30, 2003.

The appellant now appeals the jury's verdict, as well as the circuit court's September 5, 2001 order declaring that Westfield had no duty to indemnify or defend the appellant, and the circuit court's October 1, 2002 order granting summary judgment to SSI.

II.

HN1 Rule 50(b) of the *Rules of Civil Procedure* [1998] provides that, in ruling upon a motion for judgment after a verdict is returned, a circuit court may: (a) allow the judgment to stand, (b) order a new trial or (c) direct the entry of judgment as a matter of law. n2 As we stated in Syllabus Point 6 of **[**904]** **[*643]** *Huffman v. Appalachian Power Co.*, 187 W.Va. 1, 415 S.E.2d 145 (1991):

> In considering whether a motion for judgment notwithstanding the verdict under Rule 50(b) of the West Virginia Rules of Civil Procedure should be granted, the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a *prima facie* right to recover, the court should **[***16]** grant the motion.

That standard is consistent with Syllabus Point 5 of *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983) which states:

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Our reviewing standard for denial of a new trial motion was articulated in *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995):

> HN2 We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

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n2 HN3 Rule 50(b) of the *Rules of Civil Procedure* states:

> (b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have

submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) If a verdict was returned:
(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned:
(A) order a new trial, or
(B) direct entry of judgment as a matter of **[***17]** law.

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The appellant also seeks review of the circuit court's ruling that it is not entitled to indemnification or a defense under the Westfield liability policy. In this regard, we have held that HN4 the "determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syllabus Point 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002). "Where the issue on an appeal from the circuit court is clearly a question of law . . ., we apply a *de novo* standard of review.". Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Thus, "the interpretation of an insurance **[***18]** contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgement, shall be reviewed *de novo* on appeal." Syllabus Point 2, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999).

Likewise, this case comes to us procedurally as an appeal from an order granting summary judgment to SSI. As we noted above with respect to our review of questions of law, we apply a plenary review to summary judgment decisions. HN5 "A circuit court's entry of summary judgment is reviewed *de novo.*" Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Within the context of these guidelines, we will proceed to consider the parties' arguments.

III.

A.

Jury's Verdict

The appellant challenges the jury's verdict in favor of the appellee Mr. Bowyer on several grounds, and contends that on the existing record, the circuit court should have granted judgment in favor of the appellant.

Mr. Bowyer filed the instant lawsuit under the West Virginia Wiretapping and Electronic Surveillance Act, alleging that the appellant improperly intercepted Mr. **[***19]** Bowyer's conversations in various parts of the hotel through the use of hidden microphones. The Act, *W.Va. Code*, 62-1D-3(a) [1987], states in part that:

HN6 It is unlawful for any person to:

(1) Intentionally intercept, attempt to intercept or procure any other person to intercept or attempt to intercept, any wire, oral or electronic communication; or

(2) Intentionally disclose or intentionally attempt to disclose to any other person the **[**905]** **[*644]** contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this article; and

(3) Intentionally use or disclose or intentionally attempt to use or disclose the contents of any wire, oral or electronic communication or the identity of any party thereto, knowing or having reason to know that such information was obtained through the interception of a wire, oral or electronic communication in violation of this article.

The Act allows certain individuals who are injured by the violation of the Act to bring a lawsuit for compensatory and punitive damages, and attorney's **[***20]** fees and litigation expenses. *W.Va. Code*, 62-1D-12 [1987] states, in pertinent part:

HN7(a) Any person whose wire, oral or electronic communication is intercepted, disclosed, used or whose identity is disclosed in violation of this article shall have a civil cause of action against any person who so intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications, and shall be entitled to recover from any such person or persons:

(1) Actual damages, but not less than one hundred dollars for each day of violation;

(2) Punitive damages, if found to be proper; and

(3) Reasonable attorney fees and reasonable costs of litigation incurred.

The appellant asserts that there is no evidence in the trial record by which a jury could conclude that the appellant intentionally intercepted Mr. Bowyer's oral communications. The Act, *W.Va. Code*, 62-1D-2(e) [1987], defines "intercept" as follows:

HN8"Intercept" means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

[*21]**

The appellant argues that the trial court should have granted judgment to the appellant

because Mr. Bowyer testified on cross examination at trial that he had no knowledge that anyone had ever used the hotel surveillance system to listen to his conversations. n3

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n3 Specifically, Mr. Bowyer testified to the following:

> Q. Isn't it true Mr. Bowyer, that you have no knowledge whatsoever that anyone ever listened to a conversation of yours over this security system?
>
> A. That's correct.

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After examining the trial record in the instant case, it appears that the appellant's argument really is that there is no *direct* evidence that the appellant intercepted Mr. Bowyer's conversations within the hotel. There is however, sufficient *circumstantial* evidence that the jury could conclude that the appellant acquired the contents of Mr. Bowyer's oral communications through the use of an electronic device. As we have stated before, HN9 "there is no qualitative difference between direct and circumstantial **[***22]** evidence" when considering whether there is sufficient evidence to support a jury's verdict. *State v. Guthrie*, 194 W.Va. 657, 669, 461 S.E.2d 163, 175 (1995). As we stated in Syllabus Point 3 of *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963), "in determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true."

At trial, Mr. Bowyer introduced into evidence, without objection by the appellant, a videotape which was taken by Mr. Bowyer from the surveillance monitoring equipment in the hotel's front office, and which contains over four hours of both video and audio interceptions of hotel employees and members **[**906]** **[*645]** of the public speaking in the vicinity of the hotel's front desk and the hotel bar. While Mr. Bowyer does not appear on the tape, the tape does include other hotel employees and members of the public talking on telephones to other unidentified persons; members of the public **[***23]** reciting credit card information and other personal and private information; private conversations by and between hotel employees, including conversations about romance; and portions of conversations that occurred between individuals in the bar area of the hotel. The evidence is uncontroverted that the audio recordings of the hotel employees and the members of the general public were the result of electronic interceptions made without the consent of these individuals.

This videotape stands in stark contrast to statements made by Gregory Hicks, the owner of the appellant, whose deposition testimony was read to the jury in the plaintiff's case-in-chief. Mr. Hicks testified that he knew microphones were installed with the surveillance system in the hotel - hidden in the front desk area, the lobby area, and the bar - but denied that recordings were ever made using those microphones:

> Q. I believe in looking through your answers to interrogatories that it is Hi-Lad's position that videotapes of surveillance were never made; is that correct?
>
> A. That's correct.

Q. And audiotapes of surveillance were never made, correct?

That's correct.

After being shown photographs **[***24]** of the surveillance monitoring equipment, where several videotapes are seen lying near the equipment, Mr. Hicks again stated:

Q. It's still your position on behalf of Hi-Lad, Inc. that there were no tapes made of surveillance; is that correct?

A. That's correct.

At trial, Mr. Hicks testified during the defendant's case-in-chief that he had planned to use the videotaping system when the surveillance equipment was installed in 1998, but that plan had never been implemented and he had no idea who put the videotape into the machine. Mr. Hicks also testified that the surveillance system was connected to a computer modem which allowed him to dial in to the hotel from his home by telephone and "remotely access both the video feed and the audio feed[.]" Mr. Bowyer testified that once, while working at the front desk, he heard a sound like a computer modem making a telephone connection coming from the manager's office with the surveillance equipment. The hotel manager, when asked about the sound, stated that "it was Mr. Hicks dialing into, the system so that he could monitor our activities, both oral and visually, so he could keep an eye on his investment." Mr. Hicks, **[***25]** when asked directly whether he listened to the, oral communications of his employees, asserted his rights under the Fifth Amendment to the *United States Constitution* not to answer that question.

Lastly, the appellant made the argument at trial - and asserts here as a matter of public policy - that the surveillance system installed by the appellant in 1998 was necessary for the security of hotel employees and the public. The appellant contends that the system was installed after an employee was suspected of stealing from the hotel manager's safe. However, at trial, Mr. Hicks admitted that the cameras did not show the office where the safe was located. And a hotel manager testified at trial that, until June 2000, the surveillance monitoring equipment was locked in a manager's upstairs office that was only accessible by two employees. The manager also admitted that no one was assigned to watch the monitoring equipment.

Taken together, we believe that the jury could reasonably infer from the evidence admitted at trial that the appellant had both installed and used hidden microphones to acquire the contents of oral conversations by hotel employees and members of the public. Further, **[***26]** the jury could reasonably infer from **[**907]** **[*646]** the evidence that Mr. Bowyer's oral communications had similarly been acquired and even recorded. In sum, we believe the jury could properly conclude that the appellant intercepted Mr. Bowyer's oral communications in contravention of the Wiretapping and Electronic Surveillance Act.

The appellant next asserts that hotel clerks like Mr. Bowyer, who work in a public place, have no expectation of privacy; therefore, any recordings of conversations in those public places would be permitted by the Act. n4 The appellant directs our attention to the definition of "oral communication" in the Act, which states:

HN10 "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.

Because the appellee's job responsibility and job area included no private space, the appellant argues the appellee had no expectation of conversational privacy while working.

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n4 In support of its argument that Mr. Bowyer had no legitimate expectation of privacy anywhere in the workplace, the appellant cites to the employee manual given to Mr. Bowyer which states: "HI-LAD, Inc. property . . . should only be used for conducting company business." The employee manual also states that: "Individuals using HI-LAD, Inc's business equipment should also have no expectation that any information stored on their computer . . . or in any other manner - will be private." The appellant also suggests that the Court should take judicial notice that the front desk of a hotel is inherently public in nature, and that therefore no person working in such a position could possibly expect that their oral communications - whether to a co-worker or a member of the general public - would be private. We, however, do not give the evidence of record or the Act the same generous interpretation as the appellant; to do so, an individual such as Mr. Bowyer would have to presume not only that the workplace is not a private place, but that the workplace is also festooned with hidden listening devices.

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Appellee Mr. Bowyer contends that the appellant is essentially asking the Court to rewrite the Act so as to exempt certain businesses and employers from the prohibitions contained in the statute. Mr. Bowyer points out that federal and state law enforcement officers must apply for and receive a court order in advance before attempting to intercept the conversations of suspected criminals with hidden microphones. n5 The appellee takes the position that the appellant is asking this Court to interpret the Act to allow employers to surreptitiously listen to the oral communications of workers, a power that is specifically denied to law enforcement officers under the Act. We agree.

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n5 *See, e.g.,* W.Va. Code, 62-1D-8 [1987] ("The prosecuting attorney of any county . . . may apply to one of the designated circuit judges . . . and such judge, in accordance with the provisions of this article, may grant an order authorizing the interception of wire, oral or electronic communications by an officer of the investigative or law-enforcement agency[.]")

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HN11 "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959). HN12 The Act plainly prohibits

any person from intentionally acquiring another person's oral communications through the use of some electronic or mechanical device, when that other person has a reasonable expectation that their conversation is not subject to being acquired by an electronic or mechanical device. Most employees, even those working in "public" spaces, have a reasonable expectation that their oral communications with other employees or with customers are not going to be recorded by hidden microphones. n6 The jury in the instant case could properly conclude **[**908]** **[*647]** that under the circumstances Mr. Bowyer was justified in expecting that his oral communications would not be subject to electronic interception.

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n6 We note, however, that if one of the parties to the communication consents to the interception, and the purpose of the interception does not constitute a criminal or tortious act, then the interception is permitted by the Act. The Act, *W.Va. Code*, 62-1D-3(c)(2) [1987], states in part:

It is lawful under this article for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***29]**

Lastly, the appellant challenges the jury's verdict by arguing that the appellee introduced insufficient evidence of emotional distress to support the jury's award of $100,000.00 in compensatory damages. The appellant argues that this Court has held that "isolated and conclusory statements by the plaintiff as to his or her emotional state are not sufficient to prove emotional and mental distress damages." *Slack v. Kanawha County Housing and Redevelopment Auth.*, 188 W.Va. 144, 151, 423 S.E.2d 547, 554-55 (1992). The appellant asserts that Mr. Bowyer gave only bald conclusory statements of emotional distress during his testimony, but gave no testimony of how this distress manifested itself or impacted him.

Appellee Bowyer, however, asserts that he sufficiently detailed the embarrassment and distress he suffered as a result of having his private conversations unlawfully intercepted, and his humiliation when he learned he had been deceived by the appellant about the hidden microphones. Further, the appellee points out that the Act allows Mr. Bowyer to recover " actual damages, but not less than one hundred dollars for each day of violation[.]" *W.Va. Code*, 62-1D-12(a)(1) **[***30]** [1987]. The appellee therefore contends that the jury's verdict was proper.

*HN13*The Act accords a jury considerable leeway in awarding a person whose communications have been intercepted their actual damages, and goes so far as to require the jury to award a minimum of $100.00 in damages for each day that the Act is violated. Giving every reasonable and legitimate inference to the evidence in favor of appellee Bowyer, Syllabus Point 3, *Walker v. Monongahela Power Co., supra* the record supports the jury's finding that appellee Bowyer sustained a significant measure of embarrassment, humiliation and distress upon discovering that the appellant had been secretly intercepting his conversations over a four-month period, while simultaneously deceiving the appellee about the existence of any operable hidden microphones. Based upon our examination of the record and the language of the Act, we cannot say that the jury's verdict was in error.

In sum, we find no error by the circuit court in upholding the jury's verdict, and in denying

the appellant's motions for a new trial or for a judgment as a matter of law.

B.

Punitive Damages

The appellant argues that the circuit **[***31]** court erred in permitting the jury to consider and make an award of punitive damages. The appellant also argues that the punitive damages award of $400,000.00 bears no reasonable relationship to the harm suffered by appellee Bowyer.

The appellant first argues that the damages available under the Act are essentially damages for intentionally inflicted emotional distress. The appellant then argues, pursuant to our holding in Syllabus Point 14 of *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997), that when a jury is presented with an intentional infliction of emotional distress claim, but the plaintiff can show no physical trauma or medical or psychiatric proof of emotional or mental trauma, any award of emotional distress damages to the plaintiff is presumed to (at least partly) encompass an award of punitive damages. Accordingly, any additional award of punitive damages in an intentional infliction of emotional distress claim constitutes, to some extent, "an impermissible double recovery." n7 The appellant apparently **[**909]** **[*648]** therefore contends that a plaintiff cannot recover both compensatory damages and punitive damages for violations of **[***32]** the Wiretapping and Electronic Surveillance Act. We disagree.

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n7 Syllabus Points 14 and 15 of *Tudor v. Charleston Area Medical Center, Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997) state:

14. In cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages and, therefore, an additional award for punitive damages would constitute an impermissible double recovery. Where, however, the jury is presented with substantial and concrete evidence of a plaintiff's serious physical, emotional or psychiatric injury arising out of the intentional infliction of emotional distress, i.e. treatment for physical problems, depression, anxiety, or other emotional or mental problems, then any compensatory or special damages awarded would be in the nature of compensation to the injured plaintiff(s) for actual injury, rather than serving the function of punishing the defendant(s) and deterring such future conduct, a punitive damage award in such cases would not constitute an impermissible double recovery. To the extent that this holding conflicts with our decision in *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), it is hereby modified:

15. Where a jury verdict encompasses damages for intentional infliction of emotional distress, absent physical trauma, as well as for punitive damages, it is incumbent upon the circuit court to review such jury verdicts closely and to determine whether all or a portion of the damages awarded by the jury for intentional infliction of emotional distress are duplicative of punitive damages such that some or all of an additional award for punitive damages would constitute an impermissible double recovery. If the circuit court determines that an impermissible double recovery has been awarded, it shall be the court's responsibility to correct the verdict.

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First, we have specifically limited our holding in *Tudor* to only causes of action for intentional or reckless infliction of emotional distress. We stated, in Syllabus Point 11 of *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 547 S.E.2d 256 (2001), that HN14 "the specific principles and procedures established in Syllabus Points 14 and 15 of *Tudor* . . . are limited to the tort of the intentional or reckless infliction of emotional distress." Furthermore, the Act specifically states that any person whose oral communications are intercepted may recover "punitive damages, if found to be proper[.]" *W.Va. Code*, 62-1D-12 (a)(3). We decline the appellant's invitation to extend *Tudor* and thereby interpret the Act so as to preclude the recovery of punitive damages.

The appellant also argues that the amount of the punitive damage award is excessive, and bears no reasonable relationship to the evidence. The appellant points out that there is a two-step process for reviewing punitive damages:

> HN15 Our punitive damage jurisprudence includes a two-step paradigm first, a determination of whether the conduct of an actor **[***34]** toward another person entitles that person to a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if the punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

Syllabus Point 7, *Alkire v. First Nat. Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996).

On the first step, the appellant contends that its conduct in surreptitiously recording the conversations of employees does not constitute "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others" so as to support an award of punitive damages. *See* Syllabus Point 4, in part, *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895). We disagree, and believe that the jury in the instant case properly assessed whether or not the conduct of the appellant was sufficiently grievous and of such indifference to the privacy rights of others to warrant an award of punitive damages.

[910]** **[*649]** On the second step, the appellant **[***35]** argues that there was no meaningful constraint upon the jury's discretion, and no meaningful and adequate review of the jury's verdict by the circuit court, as required by *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

Syllabus Point 3 of *Garnes* requires a jury to carefully consider the following factors in determining whether punitive damages are warranted and the amount of any punitive damage award:

> HN16 When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding

punitive damages. These factors are as follows:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility **[***36]** of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

HN17(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

HN18If a jury awards punitive damages to a litigant, a circuit court must carefully review the jury's verdict applying the five factors contained in Syllabus Point 3 of *Garnes,* as well as several other factors. As we held in Syllabus Point 4 of *Garnes*

When the trial court **[***37]** reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

[911]** **[*650]** In the instant case the jury was properly **[***38]** instructed on the factors contained in Syllabus Point 3 of *Garnes* The jury's $400,000.00 verdict bears a reasonable relationship to the jury's $100,000.00 compensatory damage determination, and is in accord with the harm that is likely to occur to privacy interests when a business owner hides microphones in public places to record the conversations of both employees and the general public. The jury monitoring oral communications of employees and hotel patrons, had attempted to conceal or cover up its actions, and had made no effort to make amends for its transgression. Finally, the appellant has not been exposed to punitive damages, criminal sanctions, or excessive litigation expenses as a result of its misconduct, all factors which might merit a reduction by the circuit court of a punitive damage award as specified in Syllabus Point 4 of *Garnes*

The circuit court's May 30, 2003 order, denying the appellant's post trial motions does not specifically note whether or how the circuit court applied the factors contained in Syllabus Points 3 and 4 of *Garnes* However, we have carefully **[***39]** reviewed the record in light of those factors, and accordingly we find that the jury's punitive damage award is supported by the record, and the circuit court committed no error by refusing to set aside or reduce that verdict. n8

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n8 The appellant also contends that it is entitled to judgment as a matter of law because the use of the surveillance system was privileged; because the appellant was immune pursuant to the Workers' Compensation Act; and because of the existence of another, more specific statute, *W.Va. Code*, 21-3-20(a) [1999], which prohibits any surveillance of employees in personal comfort areas such as restrooms, showers, locker rooms and lounges. We find no merit to these arguments.

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C.

Coverage under the Westfield Insurance Policy

The appellant submits that the circuit court erred when it ruled that no insurance coverage

was available to the appellant under the commercial insurance policy purchased from Westfield.

The insurance policy at issue provides that **[***40]** Westfield will "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies. We will have the right and duty to defend any 'suit' seeking those damages." The policy defines "personal and advertising injury" as follows:

> "Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:
>
> * * *
>
> e. Oral or written publication of material that violates a person's right to privacy.

The circuit court concluded that because there was no oral or written publication of any material relating to Mr. Bowyer by the appellant, no personal or advertising injury had occurred.

The appellant argues that appellee Westfield must meet a high standard of proof to avoid its obligation to provide a defense under its insurance policy. The appellant points out that the term "publication" is not defined in the Westfield policy, and argues that other courts have concluded that the word "publication" as used in the policy is ambiguous. The appellant therefore contends that the ambiguous word "publication" should be **[***41]** construed against Westfield to cover. Mr. Bowyer's claim that the appellant used the surveillance system to capture his oral communications, and then publish that audio material through speakers to the officers and employees of the appellant. *See* Hooters of Augusta, Inc. v. American Global Ins. Co., 272 F. Supp. 2d 1365, 1378 n.12 (S.D.Ga. 2003) (holding the word "publication" is ambiguous); Western Rim Investment Advisors v. Gulf Ins. Co., 269 F. Supp. 2d 836, 846 **[**912]** **[*651]** (N.D.Tex. 2003) ("There is nothing in the CGL policy indicating that the word publication' necessarily means communicating the offending material to a third party."); TIG Ins. Co. v. Dallas Basketball, Ltd., 129 S.W.3d 232 (Tex.Ct.App. 2004) (holding that "publication" is not limited to utterance and disclosure to third parties because the policy did not define, the term); American States Ins. Co. v. Capital Associates of Jackson County, Inc., 2003 U.S. Dist. LEXIS 25532, 2003 WL 23278656, *7 (S.D.Ill. 2003) ("The Policies do not indicate that the word publication' necessarily means communicating the offending material to a third-party as required in the defamation context.")

With **[***42]** respect to general aspects of contractual interpretation involving. insurance policies, we have held that HN19"it is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syllabus Point 4, National Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987). *See also* Horace Mann Ins. Co. v. Leeber, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988) ("Any ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer." (citation omitted)); Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986) (same). The basic principle is that insurance companies may not deceive insurance consumers into believing they have coverage only to have an exclusionary provision entirely nullify it.

HN20An insurance company's duty to defend an insured is broader than the duty to indemnify under a liability insurance policy. An insurance company has a duty to defend an action against its insured if the claim stated in the underlying **[***43]** complaint could,

without amendment, impose liability for risks the policy covers. If, however, the causes of action alleged in the plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. "Included in the consideration of whether [an] insurer has a duty to defend is whether the allegations in the complaint . . . are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." Syllabus Point 3, in part, *Bruceton Bank v. United States Fidelity and Guaranty Insurance Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997). Thus, "any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations." Syllabus Point 5, *Tackett v. American Motorists Ins. Co.*, 213 W.Va. 524, 584 S.E.2d 158 (2003).

Appellee Westfield argues that no "publication" occurred in the instant case because there is no allegation that Mr. Bowyer's statements were communicated to anyone other than the officers and employees of **[***44]** the appellant. Westfield asserts that the meaning of "publication" is clear and requires publication to a third person, and that there is no coverage afforded to the appellant in the instant case by the policy language. We disagree.

The Westfield policy contains no definition of the word "publication." We find nothing in the policy indicating that the word publication necessarily means transmitting the intercepted communications to a third party, as is required of material in the defamation context. And, even were we to assume publication does require communicating to a third-party, the surveillance monitoring system apparently functioned in such a way that anyone in the manager's office or in Mr. Hicks' home had the ability to listen in on employee conversations. Accordingly, we find that the policy language can reasonably be interpreted such that there would be coverage for the allegations in Mr. Bowyer's complaint, for the oral publication of material that violated his right of privacy.

Westfield directs our attention to two additional exclusions that were not considered by the circuit court in its order, but which Westfield **[**913]** **[*652]** asserts act to exclude Mr. Bowyer's lawsuit from coverage. **[***45]** First, Westfield points to an exclusion from coverage for any criminal act. The policy states:

> This insurance does not apply to:
>
> a. "Personal and advertising injury:"
>
> * * *
>
> (4) Arising out of a criminal act committed by or at the direction of any insured[.]

Westfield argues that a violation of the Wiretapping and Electronic Surveillance Act is a felony, *see*, *W.Va. Code*, 62-1D-3(b), n9 and that there is therefore no coverage for the appellant's unlawful interception of Mr. 'Bowyers' conversations.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n9 *W.Va. Code*, 62-1D-3(b) states:

*HN21*Any person who violates subsection (a) of this section is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary for not more than five years or fined not more than ten thousand dollars or both fined and imprisoned.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

HN22 It is well settled in this jurisdiction that "an insurance company seeking to avoid liability through the operation of an exclusion has **[***46]** the burden of proving the facts necessary to the operation of that exclusion." Syllabus Point 7, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). The appellee argues that most courts have held that a "criminal act" exclusion may apply only if it is proved that the insured acted with "criminal intent." We agree, and find no evidence in the record that the appellant acted with criminal intent in purchasing and using the surveillance system; instead, the appellant asserts that SSI told the appellant that the system was completely legal, and at trial the appellant introduced evidence in an attempt to show, the system was purchased as a security system for patrons and employees. Further, HN23 criminal intent must be proven beyond a reasonable doubt, while a jury in a civil case need only apply a preponderance of the evidence test to find intent. On the existing record, we cannot find any operative fact to support the operation of the criminal acts exclusion.

The second exclusion asserted by Westfield excludes coverage for liability "arising out of any . . . employment-related practices, policies, acts or omissions, such as coercion, . . . **[***47]** harassment, humiliation or discrimination directed at that person[.]" We find nothing in the record to suggest that appellant Hi-Lad, Inc. made it a practice, or had a policy, or engaged in, acts of humiliation. In other words, while Mr. Bowyer contends he suffered humiliation as a result of the appellant's actions, there is nothing to indicate that the appellant's actions were intended to cause humiliation. Accordingly, we also find no operative fact to support this exclusion.

We therefore conclude that the circuit court erred in granting summary judgment to Westfield, and conclude that the appellant is entitled to coverage and a legal defense under the policy.

D.

Third-Party Claims against SSI

The appellant argues that the circuit court erred in granting summary judgment to SSI, and thereby dismissing the appellant's claims for indemnification or contribution. Alternatively, the appellant argues that it should have been permitted to amend its third-party complaint to add new causes of action.

The appellant contends that it has an implied indemnity claim against SSI for its actions in marketing a surveillance system that violated West Virginia law. n10 The elements of an **[***48]** implied indemnity claim are as follows:

> **[**914]** **[*653]** HN24 The requisite elements of an implied indemnity claim in West Virginia are a showing that: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.

Syllabus Point 4, *Harvest Capital v. West Virginia Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509 (2002). The appellant argues that appellee SSI, particularly in light of its actions in claiming that its surveillance system with hidden microphones was legal, should bear the brunt of the jury's verdict.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n10 The appellant does not argue on appeal that the circuit court erred in dismissing its claim for contribution, other than to conclusorily state that appellant is entitled "to have its indemnification and contribution claims remanded to the circuit court for resolution on the merits."

However, we believe that the circuit court was correct in its determination. HN25 The plain language of the Act imposes civil liability upon the person who "intercepts, discloses, uses or procures any other person to intercept, disclose or use the communications[.]" *W.Va. Code*, 62-1D-12. It does not impose liability upon the manufacturer of equipment that is used by the person to violate the Act.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***49]**

Appellee SSI, however, contends that the key to an indemnity claim - as the Court noted in *Harvest Capital* - is that HN26 the defendant seeking indemnification must show that its "independent actions did not contribute to the injury[.]" In other words, the defendant seeking indemnification must be one "who has committed no independent wrong." 211 W.Va. at 37, 560 S.E.2d at 512. SSI argues that the appellant chose to use the hidden microphones to intercept employee conversations in contravention of the Act, and has therefore committed an independent wrong. We agree, and conclude that the circuit court correctly determined that the appellant is not entitled to implied indemnification from SSI.

The appellant also asserts - as a matter of equity - that the Court should not permit SSI to use the language in the SSI sales contract requiring the appellant to indemnify SSI to avoid financial responsibility for Mr. Bowyer's lawsuit. That contractual language required the appellant to .

> . . . indemnify, hold [SSI] harmless from, and defend [SSI] against any and all claims, suits, proceedings, costs, expenses, damages and liabilities including its attorneys' fees, arising **[***50]** out of, connected with, or resulting from the Equipment . . .including without limitation, the manufacture, selection, delivery, possession, use, operation or return of the Equipment.

The appellant contends that, as a matter of fairness, the circuit court should not have allowed this contract clause to control its actions, and should have permitted the appellant to amend its complaint to include a count for fraud and breach of warranty.

Appellee SSI argues, however, that the appellant was dilatory in asserting its claim for fraud. Further, the appellee argues that even if the appellant was successful in its claim, the end result would be that the appellee would exercise the indemnification clause to seek reimbursement from the appellant. In other words, the appellee argues that the futility of the appellant's claim justified the circuit court's actions. We agree.

We have held that

> HN27 the liberality allowed in the amendment of pleadings does not entitle a parry to be dilatory in asserting claims or to neglect his case for a long period of time. . . . Lack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden **[***51]** on the moving party to demonstrate some valid reason for his neglect and delay.

Mauck v. City of Martinsburg, 178 W.Va. 93, 95, 357 S.E.2d 775, 777 (1987). The original complaint in this action was filed by Mr. Bowyer in August 2000, but the appellant waited until March 2002 to file the original third-party complaint against appellee SSI. After SSI filed its motion for summary judgment in June 2002, in August 2002 the appellant moved to amend its complaint. The circuit court was within its discretion to find that the appellant had been dilatory in seeking this amendment. Further, the circuit court was within its discretion to find that the third-party complaint and its amendment would have been futile because of the operation **[**915]** **[*654]** of the indemnification clause. n11

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n11 We note that the appellant does not challenge the circuit court's determination that "the causes of action set forth [in the amended third-party complaint] may be time-barred pursuant to the statute of limitations applicable to claims for fraud and/or negligence, *see* W.Va Code § 55-7-8a[.]"

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***52]**

We therefore find no error in the circuit court's decision to grant summary judgment to appellee SSI, and to dismiss all claims contained in the appellant's third-party complaint.

IV.

The circuit court's judgment order dated April 11, 2003, and its May 30, 2003 decision to deny appellant Hi-Lad, Inc.'s motions for judgment or a new trial are affirmed. The circuit court's October 1, 2002 order granting summary judgment to SSI is also affirmed.

However, the circuit court's September 5, 2001 order declaring that appellee Westfield had no duty to indemnify or defend the appellant is reversed, and the case is remanded to the circuit court for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

DISSENT BY: Davis; Maynard

DISSENT:

Davis, Justice, dissenting, joined by Chief Justice Maynard:

In this case the majority affirmed a jury verdict for the plaintiff, Mr. Bowyer, on the grounds that he had established by a preponderance of the evidence that his employer, the defendant, recorded conversations by him in violation of the West Virginia Wiretapping and Electronic Surveillance Act, **[***53]** W. Va. Code § 62-1D-1, *et seq* I dissent on two

separate grounds. First, the majority's determination that the jury verdict was supported by circumstantial evidence is simply wrong in view of the fact that not a scintilla of evidence was introduced to sustain the verdict. Second, under the facts presented in this case, it is clear that Mr. Bowyer lacked standing to assert a claim alleging a violation of the West Virginia Wiretapping and Electronic Surveillance Act. Accordingly, I respectfully, dissent.

A. The Law of Circumstantial Evidence Has Limitations

In affirming the jury verdict in the instant case, the majority opinion concluded that there was "sufficient *circumstantial* evidence that the jury could conclude the [defendant] acquired the contents of Mr. Bowyer's oral communications through the use of an electronic device." Majority Slip. op. at 10. I disagree.

The law in this State is clear in holding that "although mere speculation will not sustain the plaintiffs' burden of proof, both direct and circumstantial evidence can be used[.]" *Cale v. Napier*, 186 W. Va. 244, 247, 412 S.E.2d 242, 245 (1991). We have further explained that "'circumstantial evidence is adequate **[***54]** as proof if its quality is such that the jury believes that the, greater probability, of truth lies therein. *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 647, 403 S.E.2d 189, 195 (1991) (quoting *Vernon v. Lake Motors*, 26 Utah 2d 269, 488 P.2d 302, 306 (Utah 1971)). However, circumstantial evidence is "'not sufficient when the conclusion in question is based on surmise, speculation or conjecture.'" *Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995) (quoting 32A C.J.S. *Evidence* § 1039, at 753-54 (1964)). *See, also Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 642, 520 S.E.2d 418, 430 (1999) A jury will not be permitted to base its findings of fact upon conjecture or speculation.'" (quoting Syl. pt. 1, *Oates v. Continental Ins. Co.*, 137 W. Va. 501, 72 S.E.2d 886 (1952))). The court in *Summers v. Fort Crockett Hotel, Ltd.*, 902 S.W.2d 20 (Tex. App. 1995), succinctly addressed the limitations of circumstantial evidence to prove a legal theory as follows:

> An ultimate fact may be established by circumstantial evidence, but the circumstances **[**916]** **[*655]** relied upon must have probative force sufficient **[***55]** to constitute a basis of legal inference. It is not enough that the facts raise a mere surmise or suspicion of the existence of the fact or permit a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing, and must, not be equally consistent with the non-existence of the ultimate fact.

Summers, 902 S.W.2d at 25.

In the instant case, Mr. Bowyer was required to put on evidence, that demonstrated the defendant had recorded his conversations in violation of the West Virginia Wiretapping and Electronic Surveillance Act. However, Mr. Bowyer failed to produce any evidence that the defendant actually recorded or videotaped a single conversation in which he had participated. Instead, the totality of Mr. Bowyer's evidence in this respect consisted of "four hours of both video and audio interceptions of [other] hotel employees and members of the public speaking in the vicinity of the hotel's front desk and the hotel bar." The majority's conclusion that this was sufficient circumstantial evidence upon which the jury could properly find that the defendant recorded Mr. Bowyer's conversations **[***56]** is simply untenable.

Moreover, the evidence presented by Mr. Bowyer is a classic example of the type of

circumstantial evidence that compels a jury to engage in improper gross speculation. Under the decision by the majority, the traditional limitations imposed upon the use of circumstantial evidence have now been removed. In essence, the majority opinion permits circumstantial evidence to encompass any evidence that allows a jury to speculate in reaching its conclusion. This definition of circumstantial evidence directly contradicts this Court's prior precedent in this regard, and, therefore, I dissent.

B. Mr. Bowyer Lacked Standing

This Court has previously indicated that "standing is defined as [a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). Ultimately, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343, 354 (1975). **[***57]** Further, "standing is a jurisdictional requirement that cannot be waived, and may be brought up at any time in a proceeding." Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b), at 21 (Supp. 2004).

> The decisions of this Court and other jurisdictions have pointed out that an appellate court has the inherent authority and duty to *sua sponte* address the issue of standing, even when the parties have failed to raise the issue at the trial court level or during a proceeding before the appellate court.

State ex rel. Abraham Linc Corp. v. Bedell, ___ W. Va. ___, ___, 216 W. Va. 99, 602 S.E.2d 542, 554 (2004) (Davis, J., concurring). In the instant case, the parties did not raise the issue of standing; however, in view of the evidence presented during the trial, this Court had a duty to *sua sponte* address the issue.

In my concurring opinion in *Bedell*, I noted the following regarding the issue of standing:

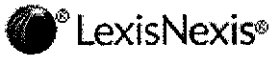
> The decisions of this Court have recognized two types of standing inquiries. First, the issue of standing maybe presented in the context of a litigant asserting an alleged **[***58]** right that is unique to him or her. This is known "as first party standing[.]" *Romano v. Harrington*, 664 F. Supp. 675, 679 (E.D.N.Y.1987). In this specific context, we articulated the elements for establishing standing in syllabus point 5 of *Findley* as follows:
>
> > Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"--an invasion of a legally protected interest which is (a) concrete **[**917]** **[*656]** and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

> The second context in which standing may be analyzed occurs when a litigant seeks to assert the rights of a third party. This standing issue "is also commonly known as jus tertii standing." *Pennsylvania Psych. Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 287 n.7 (3d Cir. 2002) In this situation "it is a well-established rule that a litigant may assert. only his own legal rights and interests **[***59]** and cannot rest a claim to relief on the legal rights or interests of third parties." *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002). We have previously noted, that traditionally, courts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case.
>
> *Snyder v. Callaghan*, 168 W. Va. 265, 279, 284 S.E.2d 241, 250 (1981) (citation omitted).

___ W. Va. at ___, 602 S.E.2d at 555-56 (Davis, J., concurring). Finally, in order to establish *jus tertii* standing, "the litigant must have suffered an injury in fact . . .; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L. Ed. 2d 411, 425 (1991) **[***60]** (internal quotations and citations omitted).

In the instant proceeding, the record overwhelmingly demonstrated that Mr. Bowyer had neither first party nor *jus tertii* standing in this case. Under both standing principles, Mr. Bowyer had to establish that he suffered an injury-in-fact. However, Mr. Bowyer's evidence established only that the defendant may have violated the West Virginia Wiretapping and Electronic Surveillance Act by recording conversations of people other than himself. This possible injury-in-fact to other people simply cannot be used by Mr. Bowyer to establish first party standing or *jus tertii* standing. Consequently, the verdict in this case should have been reversed and the case dismissed on the grounds that Mr. Bowyer's evidence failed to establish that he had standing to bring the complaint.

For the reasons stated, I dissent. I am authorized to state that Chief Justice Maynard joins me in this dissenting opinion.



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*246 Va. 67, *; 431 S.E.2d 289, **;*
*1993 Va. LEXIS 93, ***; 9 Va. Law Rep. 1446*

DAVID B. BUCHANAN v. JOHN DOE

Record No. 921159

SUPREME COURT OF VIRGINIA

246 Va. 67; 431 S.E.2d 289; 1993 Va. LEXIS 93; 9 Va. Law Rep. 1446

June 11, 1993, Decided

PRIOR HISTORY: [*1]** FROM THE CIRCUIT COURT OF THE CITY OF CLIFTON FORGE Duncan M. Byrd, Jr., Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff insured sought review of a grant of summary judgment in favor of defendant insurer granted by the Circuit Court of the City of Clifton Forge (Virginia). The court ruled that the action for recovery under the uninsured motorist provision of plaintiff's policy was foreclosed because West Virginia, where the accident occurred, required proof of "physical contact" with an unidentified driver in a "John Doe" action.

OVERVIEW: Plaintiff insured was injured in an automobile accident by an unidentified driver in West Virginia. He then filed an action against "John Doe" in Virginia where his policy was issued, seeking remuneration for his loss and joining his insurance company (insurer) as defendant pursuant to the provision for uninsured motorist coverage in his policy. The insurer moved for summary judgment and contended that proof of physical contact with the "John Doe" vehicle must have accompanied the "John Doe" tort action according to West Virginia law. The trial court agreed and granted the insurer's motion for summary judgment. On appeal, applying Virginia law to determine which law controlled the substantive issues of the action and whether the "proof of contact" rule applied, the court determined that Virginia controlled the contract issues such as the interpretation and validity of the policy while West Virginia regulated the tort aspects of the action. Therefore, because the "proof of contact" rule was a contract rule of law as opposed to tort, it was not applicable under Virginia law, and the judgment was reversed and remanded.

OUTCOME: Summary judgment in favor of defendant insurer was reversed and remanded. Virginia law controlled substantive contract issues of the action including interpretation of plaintiff insured's policy although West Virginia, where the accident occurred, controlled tort aspects. According to Virginia law, there was no requirement that insured prove "physical contact" with an unidentified vehicle in order to invoke uninsured motorist coverage.

CORE TERMS: insured, physical contact, uninsured motorist, insurer, tort action, motorist, tort law, uninsured, unknown, proof-of-contact, motor vehicle, endorsement, summary judgment, legal liability, uninsured motorist endorsement, truck driver, resident, legally entitled to recover, forum state, contractual, coverage, insurance policy, driver, choice of law, uninsured motor vehicle, substantive issues, substantive law, accompanied, happened,

insurance contract

LexisNexis(R) Headnotes ◆ Hide Headnotes

Insurance Law > Motor Vehicle Insurance > Coverage > Uninsured Motorists > General Overview

Torts > Transportation Torts > Motor Vehicles > General Overview

HN1 See Va. Code § 38.1-381.

Insurance Law > Motor Vehicle Insurance > Coverage > Uninsured Motorists > General Overview

HN2 The Virginia Uninsured Motorist statute provides that if the identity of an uninsured operator is unknown, he may be sued as "John Doe" and service of process may be made upon the insurance company as though it were a party defendant. Va. Code § 38.2-2206(E). Physical contact with the John Doe vehicle is not required to maintain this action under Buchanan's policy or Va. Code § 38.2-2206. More Like This Headnote | *Shepardize:* Restrict By Headnote

Insurance Law > Claims & Contracts > Contract Formation > Policy Delivery

Insurance Law > Motor Vehicle Insurance > Coverage > Uninsured Motorists > General Overview

HN3 See West Va. Code § 33-6-31. *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > Forum & Place

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

Torts > Procedure > Conflicts of Laws > Place of Injury

HN4 The law of the place of the wrong determines the substantive issues of tort liability. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > Forum & Place

Insurance Law > Claims & Contracts > Contract Formation > Policy Delivery

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

HN5 Generally, the law of the place where an insurance contract is written and delivered controls issues as to its coverage. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > Forum & Place

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

Torts > Procedure > Conflicts of Laws > General Overview

HN6 The forum state applies its own law to ascertain whether the issue is one of tort or contract. More Like This Headnote | *Shepardize:* Restrict By Headnote

Torts > Procedure > Commencement & Prosecution > General Overview

HN7 The word "tort" has a settled meaning in Virginia. A tort is any civil wrong or injury; a wrongful act (not involving a breach of contract) for which an action will lie. Tort is also defined as the violation of some duty owing to the plaintiff imposed by general law or otherwise. Generally, the duty must arise by operation of law and not by mere agreement of the parties. Stated differently, a "tort" is a legal wrong committed upon the person or property independent of contract. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Formation > General Overview

HN8 A contract is defined as an agreement between two or more persons which creates an obligation to do or not to do a particular thing. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

Contracts Law > Contract Interpretation > General Overview

HN9 Although not expressed in a written contract, a statutory requirement affecting the performance of the contract becomes a part of its terms just as if it had been incorporated therein. More Like This Headnote

◆ Hide Headnotes / Syllabus

HEADNOTES: Conflicts of Laws - Choice of Law - Insurance - Uninsured Motorists - Torts - Contracts - Negligence - John Doe Statutes - Proof of Contact Requirements

A Virginia motorist was injured when, without physically touching it, a truck forced his automobile off the road in West Virginia. Although the allegedly negligent truck driver stopped at the scene, he did not identify himself. He left and did not return. The plaintiff filed a "John Doe" action, pursuant to the provisions of his automobile insurance policy issued in Virginia, and Virgninia Code § 38.2-2206, seeking damages. Neither the policy nor the code section required physical contact between the vehicles in a John Doe uninsured motorist action. In a motion for summary judgment, the insurer relied upon a provision in the West Virginia uninsured motorists statute that require proof of physical contact between the vehicles in a John Doe tort action. The insurer contended that the requirement was a part of the substantive tort law of West Virginia and therefore should be applied because the accident had occurred there. The trial court sustained the insurer's motion for summaryjudgment and entered a final order of dismissal. The plaintiff appeals.

1. The Virginia uninsured motorists statute provides that if the identity of the uninsured operator is unknown, he may be used as "John Doe" and service of process may be made upon the insurance company as though it were a party defendant, physical contract between the vehicles is not required.

2. Under the conflict of law rules: (1) the law of the place of the wrong dertermines the substantive issues of tort liability, and (2) the law o the place where aninsurance contract is written and delivered controls issues as to its coverage.

3. The forum state applies its own law to ascertain whether the issue is one of tort or contract.

4. Different substantive issues can properly be decided under the laws of different states

when the choice-influencing considerations differ as they apply to the different issues.

5. The law of the Commonwealth is applied to determine whether the West Virginia proof-of-contact requirement is a matter of tort or contract.

6. A tort is any civil wrong or injury, not involving a breach of contract, for which an action will lie.

7. A contract is an agreement between twoor more persons which creates an obligation to do or not to do a particular thing and a statutory requirement affecting the performance of the contract becomes a part of its iterms as if it had been incorporated therein.

8. Nothing in the tort law of either state involved here requires that an injury be accompanied by physical contact in order to impose liability on the defendant, but under West Virginia law, in order to recover from an insurance company, under an uninsured motorist policy, the injured party must prove in his John Doe tort action that the injury was accompanied by physical contact.

9. The proof of contact requirement is a contractual provision imposed by statute and adopted as a method of protecting uninsured motorists insurers against their insureds' fraudulent uninsured motorist claims.

10. The Virginia General Assembly has employed a different method of protecting uninsured motorists insurers in John Doe cases by conditioning recovery against such insurers upon a prompt report of the accident to the insurer or to law enforcement officials.

11. Both uninsured motorist statutes expressly condition recovery in John Doe cases upon compliance with their respective protective provisions.

12. The uninsured motorist endorsement is the contract which the insurance company makes with the insured to protect him against the uninsured motorists and it follows the insured to the place of the accident outside of Virginia.

13. Liability under the statutory endorsement exists even though the accident happened in a state which has no uninsured motorists law like that of Virginia.

14. Since the plaintiff's uninsured motorist policy was issued and delivered to him in Virginia, where he resided, it is governed by Virginia law, and hence, the West Virginia proof-of-contact requirement is inappliable in this action.

SYLLABUS: *The trial court erred in sustaining the insurer's motion for summary judgment in an uninsured motorist tort case involving conflict of laws issues. That order of dismissal is reversed and the case is remanded for further proceedings consistent with this opinion.*

COUNSEL: Raymond H. Strople (Moody, Strople & Kloeppel, on brief), for appellant.

Kenneth J. Ries (John D. Eure; Johnson, Ayers & Matthews, on brief), for appellee.

JUDGES: Present: All the Justices. WHITING

OPINION BY: HENRY H. WHITING

OPINION: [*69] [290]** OPINION BY JUSTICE HENRY H. WHITING

This is an uninsured motorist case involving a conflict of laws issue, and we must decide whether our law or West Virginia law controls.

State Farm Mutual Automobile Insurance Company (State Farm) issued an automobile liability policy in Virginia to David B. Buchanan, a resident of Clifton Forge. The policy contained the following uninsured motorist (UM) provision mandated by former Code § 38.1-381, the predecessor of Code § 38.2-2206 (the Virginia UM statute):

> HN1 The company will pay in accordance with Section 38.1-381 of the Code of Virginia and all Acts amendatory thereof or supplementary thereto, all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury **[***2]** sustained by the insured or property damage, caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle.

HN2 The Virginia UM statute also provides that if the identity of the uninsured operator is unknown, he may be sued as "John Doe" and service of process may be made upon the insurance company "as though [it] were a party defendant." Code § 38.2-2206(E). Physical contact with the John Doe vehicle is not required to maintain this action under Buchanan's policy or Code § 38.2-2206. John Doe v. Brown, 203 Va. 508, 516, 125 S.E.2d 159, 165 (1962) (construing the predecessor UM statute, Code § 38.1-381(e)).

Buchanan was injured on June 9, 1989, when a truck forced his car off U.S. Route 220 in West Virginia. There was no contact between the vehicles. Although the truck driver stopped at the scene, he did not identify himself. The truck driver indicated to Buchanan that he would call the police and an ambulance, but he did not return to the scene of the collision. Hence, Buchanan is unaware of the truck driver's identity.

Pursuant to the provisions of his insurance policy and Code § 38.2-2206, Buchanan **[***3]** filed this action in the court below against **[*70]** the truck driver as "John Doe," seeking damages for his injuries and other losses. Following a stipulation by the parties and Buchanan's answer to State Farm's request for admissions that reflected the facts recited above, State Farm filed a motion for summary judgment. In support of that motion, it relied upon a provision in the West Virginia UM statute that required proof of physical contact with the John Doe vehicle in a John Doe tort **[**291]** action and contended that this requirement was a part of the substantive tort law of West Virginia. n1 Accordingly, State Farm contended, and the trial court agreed, that Buchanan could not recover from John Doe without proof of physical contact between his vehicle and John Doe's vehicle. Therefore, the court sustained State Farm's motion for summary judgment and entered a "Final Order of Dismissal." Buchanan appeals.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 We quote and paraphrase the following pertinent provisions of the West Virginia UM statute.

> HN3 Nor shall any [automobile liability insurance] policy or contract be so issued or delivered [in this state] unless it shall contain an endorsement of provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.

West Virginia Code § 33-6-31(b) (1992) (emphasis added).

> If the owner or operator of any motor vehicle which causes bodily injury . . . to the insured be unknown, . . . in order for the insured to recover under the uninsured motorist endorsement or provision, [the insured] shall:
>
> (i) [report the occurrence to designated officials within a limited time after its discovery, unless it shall already have been investigated by the police];
>
> (ii) [notify the insurance company within a limited time after the accident and permit it to inspect the insured's vehicle]; and
>
> (iii) Upon trial establish that the motor vehicle, which caused the bodily injury . . . whose operator is unknown, was a "hit and run" motor vehicle, [that had physical contact with the insured's vehicle, and have process served upon the insurance company issuing the UM policy].

West Virginia Code § 33-6-31(e) (1992) (emphasis added).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***4]**

The parties agree that under our conflict of law rules: (1) HN4 the law of the place of the wrong determines the substantive issues of tort liability, Jones v. R.S. Jones & Assocs., 246 Va. 3, , 431 S.E.2d 33, (this day decided); McMillan v. McMillan, 219 Va. 1127, 1128, 253 S.E.2d 662, 663 (1979), and (2) HN5 generally, the law of the place where an insurance contract is written and delivered controls issues as to its coverage. Lackey v. Virginia Sur. Co., 209 Va. 713, 715, **[*71]** 167 S.E.2d 131, 133 (1969). The disagreement is whether the West Virginia proof-of-contact requirement is a matter of tort controlled by West Virginia law, or one of contract controlled by Virginia law.

HN6 The forum state applies its own law to ascertain whether the issue is one of tort or contract. See Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 611 (9th Cir. 1975) (law of forum applied to decide if case is one of contract or tort); Willard v. Aetna Cas. & Sur. Co. 213 Va. 481, 482-83, 193 S.E.2d 776, 778 (1973) (law of forum **[***5]** state where UM policy issued that permitted direct action against UM insurer held substantive, not procedural). And, in doing so, the forum state applies a principle described as

> an old technique which has recently acquired the new name of "depecage". This refers to the process whereby different issues in a single case arising out of a single set of facts may be decided according to the laws of different states. This has always been the process when procedural matters were held to be governed by forum law and substantive questions by some other law, even when matters characterized as procedural had substantial outcome-determinative effect. It has always been understood also that different substantive issues could properly be decided under the laws of different states, when the choice-influencing

considerations differ as they apply to the different issues. The new development in this area is the currently increased discussion and analysis of the old technique.

Robert A. Leflar, American Conflicts Law § 109, at 221-22 (3d ed. 1977) (emphasis added) (footnotes omitted).

Thus, we apply the law of the Commonwealth to determine whether the West Virginia proof-of-contact **[***6]** requirement is a matter of tort or contract. And, we have defined a tort in the following language:

HN7 The word "tort" has a settled meaning in Virginia. "A tort is any civil wrong or injury; a wrongful act (not involving a breach of contract) for which an action will lie." Jewett v. Ware, 107 Va. 802, 806, 60 S.E. 131, 132 (1908) (internal quotation marks [and citation] omitted).

[*72] [292]** "Tort" is also defined as the violation of some duty owing to the plaintiff imposed by general law or otherwise. Generally, the "duty must arise by operation of law and not by mere agreement of the parties." Black's Law Dictionary 1335 (5th ed. 1979). Stated differently, a "tort" is a "legal wrong committed upon the person or property independent of contract." Id.

Glisson v. Loxley, 235 Va. 62, 67, 366 S.E.2d 68, 71 (1988).

On the other hand, HN8 a contract is defined as "an agreement between two or more persons which creates an obligation to do or not to do a particular thing." Black's Law Dictionary 322 (6th ed. 1990). HN9 Although not expressed in a written contract, a statutory requirement affecting the performance **[***7]** of the contract becomes a part of its terms just as if it had been incorporated therein. Harbour Gate Owners' Ass'n v. Berg, 232 Va. 98, 105-106, 348 S.E.2d 252, 257 (1986). However, as noted, the proof-of-contact requirement is contained in the West Virginia UM statute, but not in the Virginia UM statute under which Buchanan's UM policy was issued.

With these distinctions in mind, and applying Virginia law, we consider West Virginia's proof-of-contact provision. Substantive tort law in West Virginia, as in Virginia, requires that the plaintiff prove he was injured by the negligence of the defendant. But there is nothing in the tort law of either state which requires that injury be accompanied by physical contact in order to impose liability on the defendant. Under West Virginia law, however, in order to recover from an insurance company under an uninsured motorist policy, the injured party must prove in the John Doe tort action that the injury was accompanied by physical contact. But, for several reasons, we conclude that this requirement is a matter of statutory law dealing with insurance contracts.

In the first place, this provision **[***8]** imposes no duty upon John Doe, nor is it intended

to benefit any tort-feasor who runs another vehicle off the road. Indeed, had the identity of the truck driver been ascertained, and had he been uninsured, proof of contact would not have been required under the West Virginia UM statute. Therefore, we think that the proof of contact requirement is a contractual provision imposed by statute and adopted as a method of protecting UM insurers against their insureds' fraudulent UM claims.

[*73] In Virginia, the General Assembly has employed a different method of protecting UM insurers in John Doe cases by conditioning recovery against such insurers upon a prompt report of the accident to the UM insurer or to law enforcement officials. Code § 38.2-2206 (D). And we have held that this protective condition imposes a contractual duty upon the plaintiff having no relation to his John Doe tort action. John Doe v. Brown, 203 Va. 508, 515, 125 S.E.2d 159, 164-65 (1962); Hodgson v. John Doe, 203 Va. 938, 941, 128 S.E.2d 444, 446 (1962).

Secondly, both UM statutes expressly condition recovery in John Doe cases upon **[***9]** compliance with their respective protective provisions. Code § 38.2-2206 provides that "recovery under the [UM] endorsement or provisions shall be subject to the conditions set forth in this section." West Virginia Code § 33-6-31(e) (1992) provides that "in order for the insured to recover under the [UM] endorsement or provision, [the insured] shall [comply with a number of conditions including that of proof-of-contact]." We do not think what would otherwise be a contractual condition in the proof-of-contact requirement of the West Virginia UM statute is converted into an element of John Doe's breach of duty merely by providing that the contractual condition be fulfilled in the John Doe tort action. n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 We have previously considered other issues involving the UM insurer's contractual liability in John Doe tort actions. Hodgson, 203 Va. at 943, 128 S.E.2d at 447 (venue in John Doe tort action determined under general venue statutes as if action were against insurer in order to "permit the plaintiff to have the protection for which he has paid"); Truman v. Spivey, 225 Va. 274, 279, 302 S.E.2d 517, 519 (1983) (John Doe and later discovered uninsured motorist held to be same party for purposes of statute of limitations because UM carrier's contractual liability is the same whether the uninsured motorist is known or unknown).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***10]**

[293]** Finally, if we construed the proof-of-contact requirement as State Farm suggests, the scope of a Virginia insured's UM coverage would depend upon the UM statutory provisions of each state in which a Virginia insured traveled, contrary to our understanding of the purpose of UM insurance.

> The [UM] endorsement is the contract which the insurance company makes with the insured to protect him against the uninsured motorist. It is protection for which the insured has paid an additional premium and it follows the insured to the place of the accident outside of Virginia, just as the usual indemnity and collision provisions of an automobile insurance **[*74]** policy follow the car and protect the operator wherever the accident may occur.

> The liability under the statutory endorsement exists even though the accident happened in a State which has no uninsured motorist law like that of Virginia.

> Such liability, however, would be rendered unenforceable and worthless if the basic action against John Doe may be brought only where the accident happened and the State where it happened has no provision for such an action.

Hodgson, 203 Va. at 942-43, 128 S.E.2d at 447. **[***11]**

Since Buchanan's UM policy was issued and delivered to him in Virginia where he resided, it is governed by Virginia law. Lackey, 209 Va. at 715, 167 S.E.2d at 133. Hence, the West Virginia proof-of-contact requirement is inapplicable in this action.

For these reasons, we conclude that the trial court erred in sustaining State Farm's motion for summary judgment. Therefore, we will reverse the "Final Order of Dismissal," and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

CONCUR BY: LACY

CONCUR:

JUSTICE LACY, concurring.

While conflict of laws principles may be articulated clearly and without ambiguity, this case demonstrates that the application of those principles is neither simple nor direct. There is no disagreement that Virginia law is applied to determine whether the issue is one of tort or of contract, and which substantive law applies in either instance. The majority and the dissent cite case law to support their respective views, reaching mutually exclusive outcomes that each maintains is the only outcome possible. This result underscores the difficulty of resolving conflict of laws issues and I cannot **[***12]** agree that based on a reading of the prior authority either result is so clearly apparent.

The dissent finds that we are required to consider this solely as a tort action under Doe v. Brown, 203 Va. 508, 125 S.E.2d 159 (1962), disregarding the Court's recognition in Doe that certain statutory and policy conditions, including notice and proof of physical contact requirements, were requisites of coverage and that coverage **[*75]** issues were matters of contract. Id. at 515, 125 S.E.2d at 164-65. The majority, on the other hand, does not address the precedential value of the Doe decision when the Court makes its threshold determination whether the issue at hand is one of tort or contract.

Citing Perkins v. Doe, 350 S.E.2d 711 (W.Va. 1986), the dissent asserts that West Virginia clearly considers the physical contact requirement to be an element of its substantive tort law in cases of this type. However, in 1988, the West Virginia Supreme Court found, in a choice of law situation analogous to the case before us, that the provision was contractual by nature. **[***13]** Lee v. Saliga, 179 W. Va. 762, 373 S.E.2d 345, 348-49 (W.Va. 1988).

In Lee a Pennsylvania resident, injured in an automobile accident in West Virginia, brought a tort action against John Doe and others. Under West Virginia's question certification procedure, the Supreme Court considered whether the enforceability of the physical contact provision of West Virginia **[**294]** law should be "determined by the law of West Virginia, the situs of the accident, or of Pennsylvania, the situs of the insurance policy and the residence of the insured." Id. at 347. Recognizing that "uninsured motorist cases may raise questions of both tort and contract law," id. at 349, the West Virginia Court concluded that the contact requirement was governed by the law of the place of the insurance contract, a

state which, like Virginia, did not require proof of physical contact to recover in a John Doe action. Id. at 350. The Court acknowledged the apparent inconsistency between Perkins and Lee, but noted that the only question certified to it in Perkins, was whether Virginia or West Virginia **[***14]** tort law applied. It stated that, in Perkins, it did not, as in Lee, decide whether tort or contract law applied. Id. at 349. Accordingly, that Court said that Perkins did not control the issues presented in Lee. Id.

Review of Doe, Perkins, and Lee, along with the other cases cited by the majority and the dissent, does not, in my opinion, lead to the inevitable result asserted by either. I do, however, believe that an important policy consideration forms a more persuasive and conclusive basis for reaching the majority result.

Even if, arguendo, this case involved only tort issues and West Virginia's substantive tort law (including the physical contact requirement) was applicable, Virginia conflict of law principles do not require that we necessarily apply the West Virginia provisions. "Comity does not require application of another state's substantive law if it is contrary to the public policy of the forum state." Willard **[*76]** v. Aetna Cas. & Sur. Co., 213 Va. 481, 483, 193 S.E.2d 776, 778 (1973).

In my opinion, applying West Virginia law to bar a Virginia resident from establishing **[***15]** the negligence of a John Doe motorist and recovering under the uninsured motorist provisions of an automobile liability policy solely because there was no physical contact between the vehicles is contrary to a significant public policy of this Commonwealth, as reflected in a broad range of Virginia's motor vehicle statutes, rules and regulations. Those statutes include the General Assembly's enactment of the uninsured motorist insurance coverage provisions of the Code. Code § 38.2-2206. These provisions mandate policy coverage to protect non-negligent motorists injured by the acts of negligent, but uninsured, motorists. The General Assembly specifically has extended this protection to Virginia insureds who are injured by negligent unknown motorists.

To restrict the Virginia insured's recovery against unknown motorists by imposing the physical contact rule punishes those drivers who attempt to avoid such contact, defeating the broader public policy to encourage safe driving. Applying the rule also places Virginia insureds at risk from negligent uninsured motorists whenever they leave the Commonwealth and subjects them to the requisites for recovery under the uninsured motorist provisions **[***16]** of each state in which they travel. Thus, they lose the full contractual benefits of their Virginia insurance policies, despite Virginia's articulated policy of protecting Virginia insureds against unknown, uninsured motorists whose negligence causes them injury.

I note that, in light of those recognized policy interests, this Court repeatedly has found that the uninsured motorist provisions must be construed broadly to provide the remedy they were intended to provide. See, e.g., Nationwide Mut. Ins. Co. v. Sours, 205 Va. 602, 606, 139 S.E.2d 51, 54-55 (1964); State Farm Mut. Auto. Ins. Co. v. Brower, 204 Va. 887, 892, 134 S.E.2d 277, 281 (1964). Further, if the accident had occurred in Virginia, there would be no question of Buchanan's right to proceed to establish John Doe's liability for his injuries. Indeed, if Buchanan had filed suit in West Virginia, based on the facts before us here, the courts of that state would not have applied the physical contact rule to bar his action. To preclude his suit here based on an unfortunate combination of lex loci and lex fori **[***17]** , in light of the policies involved, is dictated neither by choice of law rules nor the principles of comity.

[*77] **[**295]** Accordingly, I concur in the result reached by the majority and would reverse the decision of the lower court.

CHIEF JUSTICE CARRICO concurs in the result.

DISSENT BY: COMPTON

DISSENT:

JUSTICE COMPTON, with whom JUSTICE STEPHENSON joins, dissenting.

In June 1989, David B. Buchanan, a resident of the Commonwealth of Virginia, was injured while driving a motor vehicle in the State of West Virginia. Another motor vehicle, operated by an unknown driver, allegedly ran Buchanan's vehicle off the road. There was no physical contact between Buchanan's vehicle and the vehicle operated by the unknown driver.

In April 1991, Buchanan filed the present action in the court below naming "John Doe" as defendant. The plaintiff alleged that Doe was negligent in several particulars and that plaintiff was injured as the "direct and proximate result of the defendant's negligence." The plaintiff sought an award of damages against Doe in the amount of $ 100,000.

In accordance with the Virginia uninsured motorist statute, the plaintiff served process upon the insurer that had issued a policy of bodily injury liability **[***18]** insurance with an uninsured motorist endorsement covering the plaintiff's vehicle. Code § 38.2-2206(E). The insurer filed a responsive pleading in its own name generally denying the allegations of the motion for judgment.

Subsequently, in responses to requests for admissions, the plaintiff admitted that at the time of the alleged accident "no physical contact occurred between the motor vehicle driven by the plaintiff and the motor vehicle driven by the unknown operator." The insurer, in the name of John Doe as authorized by Code § 38.2-2206(E), then filed a motion for summary judgment. Upon consideration of the pleadings, the insurance policy, the responses to requests for admissions, and the argument of counsel, the trial court sustained the motion for summary judgment and dismissed the action.

This appeal presents an uncomplicated issue. Upon a proper application of settled law, the judgment of the trial court should be affirmed.

The case can be summarized very simply. This is a tort action seeking a money judgment based on negligence. Because the tort **[*78]** was committed outside Virginia, courts of the Commonwealth apply the traditional conflict of laws rule that the substantive tort **[***19]** law of the place of the wrong governs the Virginia action. The substantive West Virginia tort law required a plaintiff to prove physical contact between a John Doe vehicle and the vehicle or person of the plaintiff. Because the alleged tort involved no physical contact and because the applicable West Virginia substantive tort law precluded recovery against a John Doe defendant absent a showing of physical contact, the trial court correctly ruled that no material fact was genuinely in dispute, Rule 3:18, and that defendant was entitled to summary judgment.

Until today, Virginia law supporting the foregoing analysis has been clearly established. Unquestionably, this is a tort action, not a contract action. Pertinent to this case, 31 years ago this Court stated: "This is not an action arising ex contractu to recover against the insurance company on its [uninsured motorist] endorsement. The insurance company is not a named party defendant and judgment cannot be entered against it in this action. This is an action ex delicto, since the cause of action arises out of a tort, and the only issues presented are the establishment of legal liability on the unknown uninsured motorist, **[***20]** John Doe, and the fixing of damages, if any." Doe v. Brown, 203 Va. 508, 515, 125 S.E.2d 159, 164 (1962). See Code § 38.2-2206(H) ("nor may anything be required of the insured [plaintiff making a claim under the uninsured motorist endorsement] except the establishment of legal liability"). Accord Truman v. Spivey, 225 Va. 274, 278, 302 S.E.2d

517, 519 (1983).

And, the plaintiff's right "to bring this action to establish legal liability on the uninsured motorist and to recover damages is not given by the endorsement but by the [uninsured motorist] statute." Doe, 203 Va. at 516, 125 S.E.2d at 165. Indeed, the **[**296]** contractual obligation of an insurer providing uninsured motorist coverage arises only after the legal liability of the uninsured "John Doe" has been established by a tort judgment. State Farm Mut. Auto. Ins. Co. v. Kelly, 238 Va. 192, 195, 380 S.E.2d 654, 656 (1989); Willard v. Aetna Casualty & Sur. Co., 213 Va. 481, 482, 193 S.E.2d 776, 778 (1973). **[***21]**

The next inquiry becomes whether Virginia or West Virginia law is to be applied in this tort action. "In resolving conflicts of laws, the settled rule in Virginia is that the substantive rights of the parties in a multistate tort action are governed by the law of the place **[*79]** of the wrong." McMillan v. McMillan, 219 Va. 1127, 1128, 253 S.E.2d 662, 663 (1979). Accord Jones v. R.S. Jones & Assocs., 246 Va. 3, 431 S.E.2d 33 (1993), decided today.

Because the place of the wrong in this case was West Virginia, the final task must be to determine the West Virginia substantive law governing John Doe tort actions. West Virginia's statutory scheme creating a system for recovering damages caused by an uninsured motorist is similar to Virginia's system. See W. Va. Code § 33-6-31 (1992). As in Virginia, an insured under a West Virginia uninsured motorist endorsement who has been injured by an unknown motorist must first bring a John Doe action to establish Doe's legal liability to the insured. Under the West Virginia statute, the uninsured motorist coverage applies only to sums that the insured "shall be legally entitled to **[***22]** recover as damages from the owner or operator of an uninsured motor vehicle." W. Va. Code § 33-6-31(b). Paralleling the decisions of this Court, the Supreme Court of Appeals of West Virginia has held that the John Doe action initiated by a plaintiff under an uninsured motorist endorsement is an action in tort. Perkins v. Doe, 350 S.E.2d 711, 713 (W. Va. 1986).

There is one significant difference, however, between West Virginia's uninsured motorist statute and Virginia's. West Virginia's statute specifies that John Doe is liable only if there has been physical contact between the John Doe vehicle and the insured or with the vehicle the insured was occupying at the time of the accident. W. Va. Code § 33-6-31(e)(iii). And the West Virginia Court has characterized this statutory requirement of contact as a rule of substantive tort law governing West Virginia accidents. Perkins, 350 S.E.2d 711 at 714 n.3.

The concurring opinion misconstrues Lee v. Saliga, 179 W. Va. 762, 373 S.E.2d 345 (W. Va. 1988), by asserting the case involves "a choice of law situation analogous to the case before us." The case is not **[***23]** at all analogous.

In Lee, a Pennsylvania resident who was insured under a Pennsylvania insurance policy was injured in a no-contact accident in West Virginia allegedly caused by John Doe. Pennsylvania, unlike Virginia or West Virginia, is a "direct action" state and allows a direct action against the insurer by one claiming uninsured motorist benefits. Id. at 348. The insurance contract contained a physical contact requirement that was invalid under Pennsylvania law but valid under West Virginia law.

[*80] The West Virginia court construed the issue in the case as a contractual question relating to policy coverage, and not a tort question dealing with Doe's legal liability. Thus, the West Virginia court analyzed the case under contract principles, applying the law of the state where the contract was issued. The West Virginia court expressly distinguished Perkins on the basis that Lee involved a contract question while Perkins had involved a tort issue. Id. at 349.

While distinguishing Perkins, the West Virginia court in Lee nevertheless reaffirmed that a "'John Doe' suit . . . is deemed to sound in tort," **[***24]** as previously explained in

Perkins. Lee, 373 S.E.2d at 348. The West Virginia court in Lee also reasserted that the insured in a "John Doe" suit must be "legally entitled to recover" from the uninsured motorist before the insurer will be required to pay. Id. As previously discussed, an insured is not "legally entitled to recover" from the John Doe defendant under West Virginia's substantive tort **[**297]** law unless the insured can prove physical contact.

Because the present case is a tort action governed by the substantive law of West Virginia, and because there was no physical contact between the vehicles involved in this accident, I believe the trial court correctly decided that the defendant was entitled to summary judgment. Thus, I would affirm.

The decision to reverse the judgment below stems from the plurality's unfortunate refusal to accept the clear, settled law in this Commonwealth that this is a tort action, not a contract action.